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No. 92-336

In The

Supreme Court of the United States

October Term, 1992

KIMBERLY LETKE,

Petitioner,

v.

CONSTANDENO VLACHOS, et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In an effort to comply with Rule 15 of the rules of the Supreme Court regarding the issues to be properly presented before the Court if certiorari were granted, the court is advised that the question presented by the petitioner in its petition for a writ of certiorari to the Court of Appeals of Maryland is different than the question presented to this Court.

So that the court can be advised as to the question, which the petitioner presented to the Court of Appeals of Maryland, that question was set forth as follows:

> (1) Were the actions of Sgt. Vlachos and Det. Berryman performed under the color of state law, as required for claims presented pursuant to 42 U.S.C. Section 1983?

The question presented for review to this Court is as follows:

> Were the actions of the Baltimore County, Maryland, Internal Affairs Police Officers, in detaining another officer in the Police Internal Affairs Office because of the refusal to sign official police documents, actions performed under color of state law under 42 U.S.C. Section 1983?

It is respectfully submitted that the question presented by the Petitioner to this Court differs materially from the issue raised before the Court of Appeals of Maryland.

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JURISDICTION

The Order of the Court of Appeals of Maryland denying the petition for writ of certiorari to the Court of Special Appeals was decided on June 18, 1992.

No rehearing or extension of time to file this writ had been sought.

Jurisdiction to review the judgment in question by writ of certiorari is conferred by 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

The proceedings at the trial level were tried before a jury and before the Honorable Dana M. Levitz, in the Circuit Court for Baltimore County, Maryland. Verdicts were entered in favor of the Plaintiff on various counts, including a claim under 42 U.S.C. Section 1983. Separate trials were held on the issues of liability and monetary damages and monetary awards were entered in favor of the Plaintiff and against the Respondent Vlachos in the amount of $3,500.00 in compensatory damages, and $1,000.00 in punitive damages, against the Respondent Berryman for $500.00 in compensatory damages and against the Respondent Cwalina for $1,000.00 in compensatory damages.

The Respondents filed a timely Motion for New Trial or, in the Alternative, a Motion for Judgment NOV. The Petitioner filed a Motion for Attorney's Fees and Costs, pursuant to 42 U.S.C. Section 1988, based upon the jury's verdict concerning the claim presented under 42 U.S.C. Section 1983. Following the hearing on the merits, the trial court granted the Motion for Judgment NOV in part,

struck the punitive damage award against the Respondent Vlachos and denied the motion in all other respects. The Motion for Attorney's Fees was granted and the court awarded a total of $3,793.65 in counsel fees and costs to Petitioner's counsel. Final judgments were entered as to all of these rulings and the Respondents promptly filed an appeal to the Court of Special Appeals of Maryland. The Petitioner filed a cross appeal only on the issue of the counsel fee award. Following the submission of briefs and arguments on the appeal and the cross appeal the Court of Special Appeals of Maryland, in an unreported opinion dated February 14, 1992, affirmed in part, and reversed in part, the judgments entered by the trial court. Specifically, the Court of Special Appeals reversed the award of punitive damages and reinstated it as to the Respondent Vlachos, reversed the award of attorney's fees, affirmed the judgments entered under the state law false imprisonment count, and reversed the judgments entered under both the state law conspiracy count and the count alleging deprivation of constitutional rights under 42 U.S.C. Section 1983. The net result of the decision of the Court of Special Appeals was to preserve the full amount of the compensatory damage judgment entered in favor of the Petitioner, and to reinstate the punitive damage judgment that had been stricken by the trial court. The award of attorney's fees and costs in favor of the Petitioner was stricken in its entirety.

On March 31, 1992, the Petitioner filed a petition for writ of certiorari requesting the Court of Appeals of Maryland to review the decision of the Court of Special Appeals of Maryland. The issue raised in that petition was the appropriateness of the action of the Court of

Special Appeals in striking the verdicts entered under the counts alleging claims under 42 U.S.C. Section 1983. A cross-petition for writ of certiorari was filed on behalf of the Respondents challenging the reinstatement of the punitive damage award. By Order dated June 18, 1992, the Court of Appeals of Maryland, without briefing or argument, denied both the petition and cross-petition for certiorari. Following that action, the present petition was filed.

The record in these proceedings discloses the following factual background:

The Petitioner and the Respondents were all members of the Baltimore County Police Department in June of 1987. The Respondents were investigators assigned to the Internal Affairs Section of the Baltimore County Police Department, who were involved in numerous investigations in which the Petitioner was the officer under investigation. There was also another related investigation in which the Petitioner was the principal complaining witness. The Petitioner was on sick leave in June of 1987, as a result of a recommendation from the Baltimore County Police Department's Psychological Services Unit.

Notwithstanding this sick leave status, the Petitioner agreed to appear for the purposes of an investigative interview to be conducted by Respondent Berryman. The Petitioner appeared as scheduled in the Internal Affairs Office and upon completion of the interview with Det. Berryman, accompanied him to the first floor of the building so that additional paperwork could be completed. While she was finishing up with Det. Berryman,

Det. Cwalina approached the Petitioner with a clipboard upon which were certain departmental forms that needed to be signed by her in connection with the other cases in which she was the subject of the investigation. Upon a review of the departmental forms submitted to her by Det. Cwalina, the Petitioner steadfastly refused to sign the forms, insisting that she did not have to sign them and could not be required to sign them because she was on sick leave status and thus, was not on duty. This verbal exchange between Cwalina attracted the attention of Sgt. Vlachos, who became involved in the conversation and advised her that he was a sergeant and gave her a direct order to sign the forms. Petitioner continued to refuse to sign the forms, despite repeated directives from Sgt. Vlachos that she sign them.

In the midst of this verbal exchange with Sgt. Vlachos, Petitioner suddenly turned and walked into him as he was standing in the doorway to the office with his forearms resting on the portals of the doorway. After bumping into Sgt. Vlachos, the Petitioner turned and attempted to walk to the rear of the building. She passed Det. Cwalina, who made no effort to stop her, and she continued to walk in the general direction of Det. Berryman, who likewise made no effort to stop her. Det. Berryman advised the Petitioner that she was not to use the backdoor to the building. The Petitioner thereupon entered one of the adjacent offices and called her attorney. Following a telephone conversation with her attorney, Sgt. Vlachos and Det. Cwalina, along with other superior officers, entered the office where the Petitioner was situated and a discussion ensued with regard to the signing of the departmental forms originally presented

by Det. Cwalina. It was ultimately agreed that the forms would be signed at a later date and that the Petitioner's attorney could be sent copies so that he could review them prior to the Petitioner signing them. Thereafter, the Petitioner left the building without further incident. Following the Petitioner's termination as a police officer as a result of the disciplinary charges investigated by the Internal Affairs Section, primarily Det. Cwalina, the present litigation was commenced.

ARGUMENT

WERE THE ACTIONS OF THE BALTIMORE COUNTY, MARYLAND, INTERNAL AFFAIRS POLICE OFFICERS, IN DETAINING ANOTHER OFFICER IN THE POLICE INTERNAL AFFAIRS OFFICE BECAUSE OF THE REFUSAL TO SIGN OFFICIAL POLICE DOCUMENTS, ACTIONS PERFORMED UNDER COLOR OF STATE LAW UNDER 42 U.S.C., SECTION 1983?

Before this Court will exercise its judicial discretion and grant review by way of a writ of certiorari, there must be "special and important" reasons therefor. As Justice Frankfurter observed in *Rice v. Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70, 74 (1955), "special and important reasons imply a reach to a problem beyond the academic or the episodic."

No "special and important reasons" exist for the issuance of a writ of certiorari in the present case. The case was decided by the Court of Special Appeals based upon a basic factual determination that the Respondents did not act as police officers, but only as private citizens. Thus the Petitioner was entitled to recover for false imprisonment, but not for her claims under 42 U.S.C. Section 1983. The legal

conclusions reached in the unpublished decision by the Court of Special Appeals have not been shown to be in conflict with the decisions of this court. The Court of Appeals of Maryland apparently did not believe that there was any conflict with any of its decisions in its denial of the Petitioner's petition for certiorari directed to that court. Indeed, the decision of the Court of Special Appeals correctly stated all of the appropriate propositions of law relative to a correct consideration of the issues necessary for evaluating claims under 42 U.S.C. Section 1983 and the Petitioner's primary complaint is that the court's analysis did not result in a decision in her favor. A brief examination of the Court of Special Appeals' opinion will demonstrate why this is so.

The issue before the Court of Special Appeals was framed in the context of evaluating whether the trial court's denial of the Respondent's Motion J.N.O.V. was in error. This was an issue involving principles of state decisional law and the Court of Special Appeals correctly framed the issue as follows:

> "A Motion J.N.O.V. must be granted where there is no rational ground upon which a verdict can be based for the plaintiff. *Cluster v. Cole,* 21 Md. App. 242 (1974); *See also Domenski v. Atlantic Refining Co.,* 202 Md. 562, 567 (1953). . . . In passing upon a Motion J.N.O.V., the evidence and all logical and reasonable inferences deductible therefrom, must be considered in a light most favorable to the plaintiff's cause of action. *Campbell v. Patton,* 227 Md. 125 (1961)." (Slip Op. at pg. 7-8)

Having thus stated the standard, the Court of Special Appeals then went on to specifically address the trial court's ruling on the claims under 42 U.S.C. Section 1983. After initially framing the question by correctly stating that the

Petitioner had the burden of demonstrating "that her fellow officers acted under color of state law and deprived her of a right, which is actually protected by the constitution," the Court of Special Appeals decided the issue as follows:

> "In determining whether Sgt. Vlachos and Det. Berryman stepped outside the bounds of the 'color of law' in their use of power made possible only because they were clothed with the authority of state law, we shall analyze whether the evidence showed that the parties reasonably believed that the policemen had authority to prevent Officer Letke from leaving." (Slip Op. at pg. 8)

Applying this standard to the factual record before it, the Court of Special Appeals then held that,

> "She could not have reasonably believed that either Sgt. Vlachos or Det. Berryman had police authority to arrest or detain her against her will for failure to sign the form or for attempting to exit the police building. Indeed, Sgt. Vlachos testified that he knew he had no state authority to physically block her exit. Thus, the parties could not have reasonably believed that blocking Officer Letke's exit was within the scope of Sgt. Vlachos and Det. Berryman's authority under color of state law." (Slip Op. at pg. 9)

This decision is quite plainly correct as the Petitioner herself refused to acknowledge the authority of Sgt. Vlachos to order her in any way because of her off-duty status, and in fact, stated, "you can order me all you want. I am not signing anything without my attorney looking at it first." Indeed, the Petitioner was in the process of disobeying and disregarding Sgt. Vlachos'

order when she tried to leave the building. Thus, it is plain, that even accepting the Petitioner's version of the facts and even if the facts are evaluated in a light most favorable to her, the Respondents were not exercising any power conferred upon them by the state as police offices but were, at worst, acting as private individuals. Indeed, it is not disputed that the Petitioner was at the Internal Affairs Office at her own convenience, and was not suspected of, nor to be charged with any crime, and was thus subject only to the control of Sgt. Vlachos as a superior officer. Det. Berryman and Det. Owalina, being officers of the same rank as the Petitioner, were not in a position to issue orders to her. In short, to the extent that the Respondents were acting wrongfully at all, they were acting as private citizens and not as law enforcement officers, as they did not in any way invoke their police powers in their dealings with the Petitioner. In short, there is no question presented in this case with respect to whether the Respondents exceeded their official authority or exercised it in some excessive way that violated the constitutional rights of the Petitioner, for they did not exercise their authority as police officers at all. In this regard, it is to be noted that the conduct complained of could have been committed by non-police personnel, who had no state authority to order or restrain the Petitioner's freedom of movement. Accordingly, the Court of Special Appeals was entirely correct when it held that:

> "In sum, it is clear that the attempts to block Officer Letke's exit were neither acts that the police officers could only commit because clothed with the authority of the State of Maryland, nor were they within the sphere of acts

> with a purpose of carrying out their official responsibilities." (Slip Op. at pg. 9)

This crucial, factual determination is dispositive of the Petitioner's claims in this regard and it does not otherwise engage any important legal issues that would require a further review by this court in the context of the present petition. The Petitioner's dissatisfaction with the analysis of the Court of Special Appeals of Maryland, and the Court of Appeals of Maryland's affirmance of that ruling affords no special or important reason for this court to review this case.

It is to be further noted that the decision of the Court of Special Appeals of Maryland did not adversely affect the monetary award entered by the jury and affirmed by the trial court. The Court of Special Appeals upheld the verdict on the false imprisonment count and affirmed the monetary award entered in favor of the Petitioner at the trial court level. Indeed, it is only because of the ruling of the Court of Special Appeals that the Petitioner was able to prevail on the false imprisonment claims. Because of the existence of public official immunity with respect to the Respondents' status as members of the Baltimore County Police Department, this public official immunity would have prevented any recovery under the state law claims for false imprisonment as to any discretionary action undertaken by a public official in the discharge of his official duties, if undertaken without actual malice. *See Behan v. Gagliano,* 84 Md. App. 719 (1990). The Court of Special Appeals did not have to consider the defense of public official immunity applicable under Maryland law because it found that the Respondents were not acting in the discharge of their official duty, "nor were they within

the sphere of acts with a purpose of carrying out their official responsibilities." (Slip Op. at pg. 9) Indeed, the alternative claims for deprivation of liberty rights under Section 1983 and the state law claims for false imprisonment reflect alternative approaches to liability. However, the two claims are mutually exclusive, as a claim for false imprisonment can be established under Maryland law without a showing of official action under color of state law, while a claim under 42 U.S.C. Section 1983, cannot be. However, the net result of the decision of the Court of Special Appeals of Maryland preserved the full amount of the monetary verdict that was entered in favor of the Petitioner, although the judgment was affirmed on the false imprisonment count and not on the 1983 count. This decision, of course, eliminates the Petitioner's right to seek an award of counsel fees under 42 U.S.C. Section 1988, but that circumstance does not in any way invalidate the appropriateness of the analysis of the evidence by the Court of Special Appeals in the present case. Indeed, it is quite plain that the filing of the present petition, like the filing of the petition for certiorari filed with the Court of Appeals of Maryland, has been done merely in an effort to seek to reinstate the award of counsel fees and costs, and for no other purpose.

There has been no showing of any departure by the decision of the Court of Special Appeals from the decisional doctrines established by this Court and by the other courts of appeal who have had occasion to consider such issues. There was no error committed by the Court of Special Appeals of Maryland in its legal analysis of the applicable case law standards, nor was there any error committed in its analysis of the factual particulars of this

case. Accordingly, that decision should now be affirmed by denial of the present petition.

CONCLUSION

There have been no special and important reasons presented that would justify the granting of the present petition. The decision of the Court of Special Appeals was based upon a straight forward factual determination that was supported by the record. Neither the decision of the Court of Special Appeals of Maryland, nor the denial of the writ of certiorari by the Court of Appeals of Maryland were in error. Accordingly, the petition seeking a writ of certiorari should properly be denied.

Respectfully submitted,

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